No. 3005

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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H. F. DANGBERG LAND & LIVESTOCK COMPANY,
Plaintiff in Error,

vs.

H. C. DAY and S. A. FOSTER, co-partners doing business under the firm name and style of DAY AND FOSTER,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WM. M. SIMS,
OLIN WELLBORN, JR.,
Attorneys for Plaintiff in Error.

Filed this.....day of September, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of Case.

This action is for the recovery of the sum of $20,000 paid by Highland Cattle Company, the assignor of plaintiff in error, to defendants in error under a mistake of fact as to the terms of a certain contract for the purchase of cattle and lands made by the agent of plaintiff's assignor with defendant.

The complaint alleges:

That plaintiff's assignor was a corporation organied and existing under the laws of the State of Nevada.

That for several months prior to March 25th, 1913, and until May 23rd, 1913, one J. C. Dodson was in the employ of said Highland Cattle Company as manager of its business of cattle raising in the State of New Mexico; that the only duties and powers of said Dodson, as such manager, were to employ laborers for the company, necessary to carry on its said cattle business, and discharge any of said laborers in his discretion, and to manage and direct said employees in the work necessary to conduct and carry on said cattle business.

That on March 17th, 1913, Dodson informed the secretary of the company that he, Dodson, could purchase of defendants all of defendants' cattle, horses, lands and cattle business equipment, situated and located in the states of Arizona and New Mexico, the cattle to count at least 9000 head with young calves thrown in and not counted, for the sum of $250,000.00.

That said secretary of said Highland Cattle Company informed said J. C. Dodson that if defendants would guarantee to deliver 9000 head of cattle, with young calves thrown in and not counted, the said secretary of said Highland Cattle Company would endeavor to have it purchase the cattle, horses, lands and cattle business equipment of defendants, situated in the States of Arizona and New Mexico for the sum of $250,000.00.

That on March 30th, 1913, Dodson met the president and secretary of the company at Reno, Nevada, and delivered to them a draft of agreement between defendants and said Dodson, as manager of Highland Cattle Company, for the sale of all cattle, horses, real estate and farming implements of the defendants for the sum of $250,000.00. Said draft contained the following: "The said party of the first part [the defendants] guarantees there to be nine thousand (9000) head of cattle, calves from October, 1912, not to be counted"; and contains also the following clause: "The bill of sale hereto attached covers nine thousand (9000) head of cattle". That Dodson then stated to the president and secretary of the company that defendants had executed a copy of the agreement then exhibited by him and that he had signed the same as manager of the company, and that the signed instrument, together with a deed of defendants' lands covering 1000 acres or more, and a bill of sale covering 9000 head of cattle, calves from October, 1912, thrown in and not counted, 90 head of horses, farming implements and cattle business equipment, all duly executed by defendants and attached to the signed agreement, had been deposited in escrow in the Bank of Duncan at Duncan, Arizona.

That on March 31st, 1913, the company, at Minden, Nevada, received from Dodson by mail an instrument in the following words and figures:

"Highland Cattle Co.
Minden, Nev.
March 25, 1913.

Bought of Day and Foster the following:

No. Head	Livestock.	Weight.	Price.	Amount.
	All their cattle, horses and land in Arizona and N. M., amt of this check			20,000.00.
	There are to be 9000 cattle, above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc. Above livestock to be delivered f. o. b. cars..... 191 and hereby acknowledge receipt of $20,000.00.			

H. C. DODSON,
Buyer

DAY & FOSTER,
Seller."

And afterwards, on March 31st, 1913, Highland Cattle Company paid a draft, dated March 25th, 1913, drawn upon it by Dodson to the order of the defendants in the sum of $20,000.00.

That the president and secretary of the company believed the statements made to them by Dodson, as aforesaid, were true, and further believed that the instrument received by the company by mail on March 31st, 1913, was in all respects genuine; and so believing, caused the Highland Cattle Company to honor and pay the draft aforesaid.

That on May 26th, 1913, at Lordsburg, New Mexico, the president and secretary of Highland Cattle Company requested the defendant Foster to accompany them to the bank and examine all papers and instruments held in escrow by the Bank of Duncan relating to the transaction. That Foster and the secretary of Highland Cattle Company then went to Duncan and were shown by the manager of said

bank the signed instrument in the following words and figures:

"This agreement, made this Twenty-fifth day of March in the year of our Lord One Thousand Nine Hundred and Thirteen between Day and Foster of Duncan, Greenlee County, State of Arizona, by C. A. Foster, Agent for said Day and Foster, the party of the first part, and J. C. Dodson, Manager of the Highland Cattle Company, of Minden, Nevada, the party of the second part, Witnesseth:

That for and in consideration of the sum of Twenty-thousand and 00/100 ($20,000.00) Dollars, lawful money of the United States, in hand paid to the said party of the first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part does hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, ect., mentioned in the Deed hereto attached and in the Bill of Sale hereto attached. And the said party of the second part agrees to pay to the said party of the first part the further sum of Two Hundred and Thirty Thousand & 00/100 ($230,000.00) Dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913. The said deed and Bill of Sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon payment of said sum herein mentioned. And the said party of the first part hereby guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land more or less.

The Bill of Sale hereto attached covers Seven Thousand head of cattle, more or less, and ninety head of horses, more or less.

The said party of the first part covenants and agrees to relinquish all applications to buy and lease State Lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

(Signed) Day & Foster,
S. A. Foster.
(Signed) J. C. Dodson, Manager
Highland Cattle Co."

That they were also, at the same time, shown a bill of sale executed by defendants by S. A. Foster, Agent, purporting to sell to the Highland Cattle Company all cattle branded with certain brands and marks. That said instrument did not state or specify the number of cattle sold. That immediately after said instruments had been examined and read by the secretary of the Highland Cattle Company, defendant Foster stated to said secretary that the following words and figures contained in the said instrument received by the Cattle Company on March 31st, 1913, and above set forth, were false and fraudulent and had been inserted above the signature of the defendants after it had been executed by them, viz.: "There are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc." That defendant Foster then stated to said secretary that defendants did not own or possess on their cattle ranges

in Arizona and New Mexico any greater number of cattle than 7000 head, including young calves. That, thereupon, the secretary of Highland Cattle Company stated to defendant Foster that the company repudiated and disaffirmed the purported contract held in escrow by the bank and that it demanded the repayment of the $20,000.00 paid as aforesaid.

That Dodson had no authority, expressed or implied, to bind the said Highland Cattle Company to any agreement for the purchase of said lands, cattle or other property of the defendant.

That said Highland Cattle Company never accepted nor ratified the signed instrument held in escrow by the Bank of Duncan.

The defendant Foster was not served with process. The defendant Day, in his answer, alleges: That Dodson was the director, vice-president and manager of the Highland Cattle Company and the owner of approximately one-third (⅓) of the capital stock thereof, and also resident agent for the corporation in the States of New Mexico and Arizona.

He further alleges that said Highland Cattle Company was under the domination and control of Dodson, one Frank E. Humphrey, and one H. F. Dangberg, and was used merely as a device and agency to enable them to further their joint adventure for profit, the object and purpose of which adventure was to secure control, by purchase or otherwise, of ranches, large areas of land and cattle

and stock in the States of New Mexico and Arizona; that said Dodson was the managing agent of said corporation and syndicate composed of himself and said Dangberg and Humphrey, and as such duly authorized to purchase tracts of land, ranches, cattle, stock and other like property, and that, as such agent, said Dodson, between the 13th of January, 1913, and the 25th day of May, 1913, did purchase for the Highland Cattle Company and said syndicate, divers tracts of land, ranches, cattle, stock and other like property, and said purchases by said Dodson were well known to defendant.

He further alleges that the secretary and president of the Highland Cattle Company knew, or, in the exercise of reasonable care, would have known, that the purported draft of agreement delivered to them by Dodson was not a true copy of the signed agreement. He further alleges that Highland Cattle Company knew or, in the exercise of reasonable care, would have known that the words: "There are to be 9000 cattle above October calves, about 90 horses and 1000 acres or more deed land, all leases, etc.," in the instrument, alleged in the complaint to have been received on March 31st, 1913, were interpolated and spurious.

He further alleges that by honoring and paying the draft for $20,000.00 on March 31st, 1913, the Highland Cattle Company ratified said contract; and that on or about June 21st, 1913, defendants were ready and willing and able to convey a good title to the ranches, cattle and live stock and other

personal property agreed by them to be conveyed in said contract, and on said date they made tender of such conveyances to said Highland Cattle Company, and have ever since kept such tender good.

Specification of Errors.

The following assignments of error by the trial court are relied upon:

I.

In sustaining the defendant's motion to strike out the following testimony of H. F. Dangberg, witness for plaintiff, relating to Dodson's conversation with him concerning the agreement to purchase the "Lazy B. outfit", to wit:

> "Mr. Dodson stated that the document (Plaintiff's Exhibit 3) was a carbon copy of an original that was in the Bank of Duncan, Arizona, and that it purported to be a trade and option that he had taken with the Foster and Day people on the 'Lazy Bee' outfit" (Tr. page 70).

Said testimony was stricken out on the grounds of being hearsay, incompetent, irrelevant and immaterial and not said in the presence of the defendants and was a gratuitous statement of the plaintiff's own agent (Tr. page 72).

II.

In ruling out the offer of plaintiff to establish by its witness, Dangberg, the fact that Dodson in

the presence of Mr. Humphrey and Mr. Dangberg, handed them the document in evidence (Plaintiff's Exhibit 3) and stated to them at that time, that the original of this contract, which he and defendant Foster had signed, was placed in escrow in the Duncan Bank, and that there were to be bills of sale and other papers also deposited in the bank. The court refused the offer and stated that any such testimony as offered had been ruled out (Tr. pages 72-73).

III.

In sustaining defendant's objection to the question asked F. E. Humphrey, a witness for plaintiff, as to what, if anything, Dodson said to him relative to said contract (Plaintiff's Exhibit 3) at the time same was handed to witness by Dodson in the presence of Dangberg (Tr. pages 112-113); to which question witness would have testified that Dodson stated that the document was a carbon copy of the signed original that was in the Bank of Duncan, Arizona.

IV.

That the evidence was and is insufficient to justify finding No. 2, which finds that "During all the times mentioned in the amended complaint the Highland Cattle Company was engaged in the business of buying and selling cattle and cattle ranches in the State of New Mexico and in Arizona. That for several months prior to the 25th day of March, 1913, and until the 23rd day of May, 1913, one

J. C. Dodson was the vice-president of the said Highland Cattle Company, also a director and large stockholder therein, and was resident agent of said Highland Cattle Company in the State of New Mexico, and was manager of its business in the said States of New Mexico and Arizona and during all of the aforesaid times was acting as the manager of all its business in the States of New Mexico and Arizona."

V.

That the evidence was and is insufficient to justify finding No. 3, which finds that "On or about the 25th day of March, 1913, the Highland Cattle Company, a corporation by and through its duly authorized agent, J. C. Dodson, at Duncan, Arizona, entered into a written contract with Day and Foster, which said contract was and is in the words and figures as follows:

"This agreement made this twenty-first day of March, in the year of our Lord one thousand nine hundred and thirteen, between Day and Foster of Duncan, Greenlee County, State of Arizona, by S. A. Foster, agent of said Day and Foster, the party of the first part, and J. C. Dodson, manager of the Highland Cattle Company, of Minden, Nevada, party of the second part.

Witnesseth: That for and in consideration of the sum of $20,000.00 dollars, lawful money of the United States, in hand paid to the party of the

first part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, the said party of the first part hereby grant, bargain, sell and convey unto the said party of the second part all cattle, horses, real estate, etc., mentioned in the deed hereto attached and in the bill of sale hereto attached.

And the said party of the second part agrees to pay to the said party of the first part the further sum of $230,000.00 dollars, lawful money of the United States, said sum to be paid on or before the twentieth day of June, 1913.

The said deed and bill of sale hereto attached shall be deposited in escrow in the Bank of Duncan, Duncan, Arizona, to be delivered to the said party of the second part upon the payment of the said sum herein mentioned.

And the said party of the first part guarantees that all property mentioned in said papers is free from all incumbrances of whatsoever kind and that they have a good and perfect title to the same.

The deed hereto attached covers one thousand acres of land, more or less. The bill of sale hereto attached covers seven thousand head of cattle, more or less, and ninety head of horses, more or less.

Said party of the first part covenants and agrees to relinquish all applications to buy and lease state lands in New Mexico and Arizona.

In witness whereof, the said parties to this agreement have hereunto set their hands this twenty-fifth day of March, 1913.

DAY & FOSTER,
S. A. FOSTER,
J. C. DODSON,
Manag. Highland Cattle Co.

State of Arizona,
County of Greenlee.—ss.

Before me, B. R. Lanneau, a notary public, in and for the County of Greenlee, State of Arizona, on this day personally appeared S. A. Foster, agent for Day and Foster, and J. C. Dodson, manager of the Highland Cattle Company, known to me to be the persons whose names are subscribd to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 25th day of March, 1913. My commission expires Feby. 23, 1916.

B. R. LANNEAU, Notary Public."

VI.

That the evidence was and is insufficient to justify finding No. 6, which finds "that each and all of the allegations set forth in paragraph numbered XIV of plaintiff's amended complaint are untrue; and the court finds that the said J. C. Dodson at the time he entered into said contract of March 25, 1913, did have the authority to enter into same for

and on behalf of the said Highland Cattle Company."

VII.

That the evidence was and is insufficient to justify finding No. 8, which finds "that the Highland Cattle Company paid to said Day and Foster $20,000.00 as a part payment under and according to the terms of the aforesaid contract of March 25, 1913, and that said payment was not made by the Highland Cattle Company to the said Day and Foster by reason of any mistake upon the part of the said Highland Cattle Company, concerning said contract or its terms."

VIII.

That the evidence was and is insufficient to justify finding No. 10, which finds "that neither the sum of $20,000.00, nor any other sum, is due or owing or unpaid from the defendant H. C. Day to the plaintiff."

Argument.

I.

IT WAS ERROR FOR THE TRIAL COURT TO STRIKE OUT AND REFUSE TO RECEIVE TESTIMONY OF STATEMENTS MADE BY DODSON TO THE PRESIDENT AND SECRETARY OF THE HIGHLAND CATTLE COMPANY ON MARCH 30th, 1917, AS TO THE NATURE AND CONTENTS OF THE AGREEMENT SIGNED BY DODSON AND DEPOSITED IN ESCROW WITH THE BANK OF DUNCAN.

One of the principal issues in this case is whether or not Highland Cattle Company ratified the agreement with defendants signed by Dodson.

It is elementary that ratification of the act of an agent can only be had when the principle has full knowledge of all material facts.

2 C. J. 476;

Owings v. Hull, 9 Pet. (U. S.) 607, 629.

The statements of Dodson to the officers of the corporation therefore become material and relevant, tending to show what knowledge the president and secretary of the corporation had of the transaction at the time they accepted and paid the draft for $20,000.00. Such evidence is not hearsay. It was not sought to be introduced for the purpose of establishing the *truth* of the statements by Dodson, but simply the *fact* that he made such statements.

That evidence of this nature is so admissible is held in the case of

Davenport Savings Fund & Loan Association v. North American Fire Insurance Co., 16 Iowa 74, 77.

II.

THERE IS NO EVIDENCE TO JUSTIFY THE FINDING THAT THE HIGHLAND CATTLE COMPANY WAS ENGAGED IN THE BUSINESS OF BUYING AND SELLING CATTLE AND CATTLE RANCHES IN THE STATES OF NEW MEXICO AND ARIZONA; NOR IS THERE ANY EVIDENCE TO JUSTIFY THE FINDING THAT J. C. DODSON WAS A LARGE STOCKHOLDER IN SAID COMPANY AND WAS MANAGER OF ITS BUSINESS IN THE STATE OF ARIZONA.

The record nowhere discloses any evidence that the Highland Cattle Company was engaged in the

business of buying and selling *cattle ranches.* The only evidence as to its business is that it was engaged in the buying and selling of cattle (Tr. page 82).

That the corporation was engaged in business in the State of Arizona, or had transacted any business in said state, is likewise unsupported by any evidence. The record shows that the corporation had entered and was doing business only in the State of New Mexico. There is no evidence that Dodson at any time transacted any business in the State of Arizona except that pertaining to the transaction involved in the case at bar.

That Dodson was, in fact, not a stockholder of the corporation appears from the evidence that, although he subscribed for 66,666 shares (Tr. page 85) he had not invested any money in the corporation nor paid for said stock (Tr. pages 115-116) and the certificate for the stock subscribed by him was never delivered to him (Tr. page 84).

III.

THERE IS NO EVIDENCE THAT DODSON WAS AUTHORIZED BY THE HIGHLAND CATTLE COMPANY TO ENTER INTO THE CONTRACT HE SIGNED FOR THE PURCHASE OF THE "LAZY BEE" LANDS AND CATTLE.

It is fundamental in the law of agency that the power of every agent to bind his principal rests upon the authority conferred upon him by that

principal, and this authority as to third persons consists of:

(a) The powers intentionally conferred;

(b) Those incidental to or implied from the main powers conferred;

(c) Those which custom and usage have added to the main powers;

(d) Those which the principal has caused, as by a previous course of dealing, persons dealing with the agent to believe that the principal has conferred, as well as power, the exercise of which by the agent, the principal is by his conduct estopped to deny;

(e) Or power, the exercise of which the principal has subsequently approved and ratified.

2 C. J. 560.

(A) No Power to Enter Into the Contract Signed Was Intentionally or Expressly Given Dodson.

There is not a word of evidence in the record showing that Dodson was ever given or had ever exercised any general authority to buy or sell cattle outfits, including cattle, lands and equipment. No such resolution or other authority from the corporation is in evidence.

The only evidence of the power intentionally or expressly conferred by the corporation upon Dodson with reference to the transaction in qusetion is found in the testimony of Dangberg as to the instructions given by him and Humphrey, as secretary

and president respectively of the corporation, to Dodson, and consists of the instructions given Dodson by Dangberg and Humphrey as testified to by them and as shown by the letters from Dangberg and Humphrey to Dodson and from Dodson to Dangberg and Humphrey.

Mr. Dangberg testified:

> "Mr. Humphrey and myself met Dodson at Lordsburg, about the middle of February, 1913. I believe at that time we talked over with him about looking up other cattle deals and reporting to us, and seeing if we could get any options, and reporting to us. We talked over the 'Lazy Bee' deal with him and directed him to see what kind of an option we could get on it on the basis of so much a head. Mr. Humphrey and myself, as president and secretary of the Highland Cattle Company, told him to go ahead. He told us he could get the 'Lazy Bee' matter settled for $27.00 per head, October calves thrown in, and the lands and other holdings of the company to go in with the trade. I told him if he could buy the outfit on that basis to go and get an option and get the option extended so we could get back to Nevada and arrange our finances to take over the deal on the basis as he had reported it to us, telling him also to arrange the payments as small as he could, giving us time and opportunity to fix our finances in regard to handling this deal; that was about the extent of our conversation.
>
> About the 13th day of March, 1913, Dodson and myself went to Santa Fe. We discussed the 'Lazy Bee' matter and he presented the thing to me in the same way, and stated he thought he could buy an option upon the 'Lazy Bee' on the basis of $27.00 per head, October calves thrown in, and the rest of the holdings

to go in and he thought he could get a reasonably small payment down and we could finance it and put it over. I told him if he could make the deal on that basis, I could get the boys in Nevada to stand behind the deal, and we could finance it and put it over. I, as secretary of the company, gave him no other authority than just stated in the two conversations mentioned" (Tr. pp. 76, 77).

"He talked of it in that way, explaining to me that it was on the basis of $27.00 per head, that the deal was $250,000.00, but that the cattle —anything less than the nine thousand head of cattle would count off the lump sum of $250,000.00, on that basis of $27.00 a head, making the ranches and the holdings $7000 secured in; that is as I explained the deal" (Tr. page 88).

Dodson's letters to Dangberg and Humphrey (Tr. pages 78-126) corroborate the testimony of Dangberg. In these letters Dodson advised that he can trade with defendants along the lines mapped out by Humphrey, the president of the corporation.

The letters from Dangberg and Humphrey to Dodson further corroborate the testimony of Dangberg that Dodson had no authority to do other than secure an option upon the "Lazy Bee" outfit.

In these letters the following expressions were used with reference to the contemplated purchase of defendants' business:

"Am truly hopeful that you will have things lined up for the 'Busy Bee' by the time Frank and I reach there" * * * (Tr. page 92).

"We are both anxious for the 'Lazy Bee' deal and hope to hear from you before the week ends regarding same" (Tr. page 95).

"Trust that will be prepared with all finances necessary to put over the 'Lazy Bee' deal" (Tr. pages 97-98).

"Hope you get a tie up on the 'Bee' " (Tr. page 99).

"Asking you the last possible data you had on making the 'Lazy Bee' deal" (Tr. page 100).

"I trust to hear from you and to the effect that you have made the 'Lazy Bee' deal along the lines that we had talked over" (Tr. page 102).

"We are to be in Carson together tomorrow to decide on the 'Lazy Bee' matter" (Tr. page 107).

"When I go to Reno, will figure out whether we can handle the 'Lazy Bee' or not" (Tr. page 114).

We submit that there is nothing in these letters inconsistent with the testimony of Dangberg that Dodson's authority was simply to secure an option for the "Lazy Bee" outfit for $250,000.00 on terms, with a guarantee of 9000 head of cattle, young calves thrown in and not counted, together with their lands and equipment in Arizona and New Mexico.

The most adverse interpretation would indicate that Dodson was authorized to make the purchase of the lands and cattle of the defendants upon the terms and conditions specified by the president and secretary of the corporations, as testified to by Dangberg.

That the actual authority conferred upon Dodson by the corporation was limited, as above contended,

is further evidenced by the fact that Dodson not only failed to disclose to the corporation the true terms of the contract signed, but by means of the purported carbon copy of the signed contract and the altered receipt or advice made it appear that he had entered into the contract with the defendants in line with his authority. That he had exceeded such authority is further evidenced by the testimony of defendant Foster that Dodson later wanted him to change the contract so as to guarantee 9000 head of cattle instead of 7000, more or less (Tr. page 139).

(B) No Power to Purchase the Lands and Cattle of the Defendants Was Conferred Upon Dodson by Reason of His Position as Manager of the Corporation's Ranch or Business in New Mexico.

The evidence shows that Dodson was not elected general manager and superintendent of the corporation (Tr. page 79). Conceding, however, for the purpose of this argument, that he was acting as such general manager and superintendent, the by-laws of the corporation, defining the duties of the superintendent and manager (Tr. page 111) confer no power upon such superintendent and manager to bind the corporation in a transaction such as is involved in the case at bar. His duties are defined as of a general supervising nature, and it especially states that he shall be subject to the orders of the board of directors.

It is a fundamental principle of law that a corporation is bound by the acts of its manager only when acting within the scope of his authority as such manager.

> "An act pertaining to its ordinary business is binding upon the corporation when performed by the president and secretary, yet no such presumption prevails when the act done by such officers does not fall within the scope of power conferred upon and usually exercised by them as part of the ordinary business of the corporation."
>
> *Mulligan v. Smith,* 59 Cal. 206, 224-5.

We submit that it is not within the scope of the authority of even a general manager of a corporation engaged in the business of buying and selling cattle and owning about 3000 head of cattle (Tr. page 170), to purchase for the corporation the entire properties, including over 1000 acres of land and 7000 head of cattle, of parties engaged in the same business.

In the case of

> *Blen v. The Bear River and Auburn Water and Mining Co.,* 20 Cal. 602-613,

it was held that the purchase of land, with a view to extending the operations of a corporation, is not a matter within the ordinary course of business of said corporation, and its president, as such, has no authority to bind the corporation by a contract of purchase.

That a general manager of a corporation has no implied authority to purchase a rival business is held in the case of

Manhattan Liquor Co. v. Magnus, 43 Tex. Civ. Ap. 463.

The court said:

> "We have no difficulty in concluding that within its charter or power the corporation could have established and conducted more than one retail liquor store in the city, * * * but it does not follow that Chan, as its general manager and under his general authority as such and in the absence of express authority from its directors, could purchase and conduct another and distinct establishment from the one already established."

The authority of the general manager of a corporation, organized for the care of live stock and its sale to a certain market to conduct its ordinary business, is not broad enough to empower him to sign a petition for paving a city street and thus bind the real estate of the corporation abutting thereon with the cost of the improvement.

Trephagen v. South Omaha, 69 Neb. 577.

Dodson's position as vice-president and director of the corporation, we submit, did not confer any authority upon him to transact any business for the corporation unless expressly authorized thereto. The provision of the By-Laws conferring the powers of the president upon the vice-president in the former's absence (Tr. p. 108) must be construed as referring to the president's absence from its prin-

cipal office in Nevada, the corporation having been organized under the laws of that State.

It is likewise well settled that individual stockholders of a corporation cannot, unless expressly authorized, bind the corporation.

7 R. C. L. 623.

And it cannot be maintained that Dodson's appointment as state agent, in charge of its principal place of business in New Mexico, conferred upon him any greater authority than he had by reason of his position as manager of the corporation's ranch and business of buying and selling cattle.

(C) There Is No Evidence That Power to Enter Into the Contract Signed Was Conferred Upon Dodson as Manager of the Ranch and Business of the Corporation by Reason of Any Custom or Usage.

The record is absolutely devoid of any evidence as to any custom or usage relating to Dodson's power to purchase cattle-lands and cattle.

(D) By No Previous Course of Dealing Had the Corporation Caused Defendants to Believe That Dodson Had Power to Enter Into the Contract Signed; Nor Is It Estopped to Deny Such Power in Dodson.

There is absolutely no evidence that Dodson, at any time prior to the transaction in question, purchased land or cattle ranches and equipment or cattle outfits, for the corporation. The only evidence as to any purchases by Dodson shows that, *prior to the incorporation of the Highland Cattle*

Company, Dodson, *in his own name,* purchased cattle from one Wilson and from one Robinson or Robson (Tr. p. 110). The Wilson deal involved 1200 or 1500 cattle and the Robinson deal about 2500 cattle (Tr. p. 120). These contracts, after the incorporation of the company, were assumed by it and the purchase price paid.

There is absolutely no evidence that Dodson made any purchases of cattle on behalf of the corporation *after it was incorporated,* and no attempt was made to show that Dodson, at any time, had purchased lands, cattle ranches or cattle ranch equipment for the corporation.

The only evidence as to defendants' knowledge of any purchases made by Dodson is that defendant Foster had a conversation with Wilson concerning the sale by him of cattle to Dodson and that Wilson informed him that Dodson represented the Highland Cattle Company (Tr. p. 146).

This deal was made with Wilson by Dodson for himself in November, 1912, before the incorporation of the company (Tr. p. 110). In February, 1913, after the incorporation of the company, it assumed the Wilson contract (Tr. p. 123) and paid for the same by draft drawn upon it by Dodson under instructions from the president, Humphrey (Tr. p. 130).

We submit there is nothing in either the Wilson or Robson transactions which could justify the defendants in assuming that Dodson was clothed

with authority to purchase the entire outfit of defendants, who were then engaged in a similar and rival business, and which outfit comprised not only cattle in practically five times the number of those involved in the Wilson deal, but also over a thousand acres of land, farming implements and cattle ranch equipment.

As we have shown that, under the authorities, it is not within the ordinary scope of authority of a general manager of a corporation as such to purchase land to extend its business or to purchase a rival or similar business, the defendants could not rely upon the fact that Dodson was manager of the corporation's ranch and business of buying and selling cattle in New Mexico as indicating that he had authority to enter into the contract in question, especially where the evidence shows that Dodson at no time had made a *similar* contract for the corporation.

> "In order to establish implied authority, the preponderance of evidence must show *similar* transactions in which the acts of the agent were authorized and ratified."
>
> *Robinson v. Nevada Bank,* 81 Cal. 106.

As no implied or general authority to make the contract in question existed in Dodson by reason of his office as manager or by reason of any prior course of dealing known to defendants, defendants were bound to know that express and special authority of the corporation was necessary to empower Dodson to enter into a binding contract.

The general rule of agency that a person who deals with an agent is bound to take notice of, and is therefore presumed to know, the extent of the agent's authority, is fully applicable to a person dealing with another as the agent of a corporation. So when one deals with an agent of a corporation solely upon the latter's representations as to his own authority, the liability of the corporation depends not on such representations but on the actual authority conferred on the agent in the particular transaction.

7 R. C. L., pages 625-6.

The Supreme Court of Arizona in

Franklin v. Havalena Mining Co., 16 Ariz. 200-208,

quotes with approval Cook on Corporations, Section 719:

> "A general manager does not displace them (the directors), and a person dealing with a corporation is bound to take notice of that fact."

> "The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal and like a railroad crossing suggest the duty to 'stop, look and listen', and if he would bind the principal he is bound to ascertain, not only the fact of the agency, but the nature and extent of the authority."

Brutinel v. Nygren, 154 P. 1042 (Ariz.).

> "There is a general rule that when one deals with an agent, it behooves him to ascertain cor-

rectly the scope and extent of his authority to contract for and in behalf of his alleged principal, for under any other rule it is said every principal would be at the mercy of his agent however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes, before he closes the bargain with him."

Morganton Bank v. Hay, 143 N. C. 326, 330; 55 S. E. 811.

"The extent to which a principal shall authorize his agent is completely within his determination, and a party dealing with the agent must ascertain the scope and reach of the powers delegated to him and must abide by the consequences if he transcends them."

Porges v. U. S. Mortgage, etc. Co., 203 N. Y. 181, 188; 96 N. E. 424.

"The attorney has only such authority as the principal has chosen to confer upon him, and one dealing with him must ascertain at his own risk whether his acts will bind the principal."

Golinsky v. Allison, 114 Cal. 458, 460; 46 P. 295.

A general agent cannot enter into contracts of an unusual and extraordinary nature without special authority.

Shaw v. Stone, 1 Cush. (Mass.) 228;

Ricker Nat. Bank v. Stone, 21 Okla. 833.

Certainly, it cannot be maintained that the purchase of 7000 cattle and over a thousand acres of land, together with farming implements and cattle ranch equipment, is a usual and ordinary transaction in the business of a corporation engaged in buying and selling cattle, who, at the time, owned only about 3000 cattle. On the other hand, we contend that it most obviously is an unusual and extraordinary transaction involving the purchase of a cattle ranch, cattle and outfit over twice the size of that which Dodson was managing.

The doctrine that a person dealing with an agent is bound to ascertain the extent of his authority is particularly applicable where the agent is dealt with the first time.

Lauer Brewing Co. v. Schmidt, 24 Pa. Super. 396.

In addition to his knowledge of the Wilson deal, which we submit should not justify the defendant Foster in assuming that Dodson had authority in the premises, the only evidence as to Dodson's authority is the representation made to Foster and Lanneau by Dodson himself.

A person dealing with an agent should ascertain the extent of his authority from the principal, and he cannot rely upon the agent's statement or assumption of authority.

2 C. J. 563, and cases cited.

It is a well settled rule of law that those dealing with a known agent must do so at their peril as to his authority.

Bank of Commerce v. Baird Mining Co., 13 N. M. 424, 429;

Franklin v. Havalena Mining Co., 16 Ariz. 200;

Brutinel v. Nygren, 154 P. 1042 (Ariz.).

It therefore became incumbent upon the defendants to ascertain the extent of Dodson's authority to enter into the contract in question. Foster knew Dodson claimed to represent the Highland Cattle Company in the transaction, and in a deal the size and importance of the one in question, as a prudent business man he either should have required Dodson to produce evidence of his authority to enter into the contract or made inquiry by wire or mail of the corporation at its home office. Had he done so, he would have ascertained the extent of Dodson's authority, viz: to purchase defendants' outfit, consisting of lands, cattle-ranch equipment, etc., and cattle with a guarantee of at least 9000 head of cattle, October calves thrown in and not counted.

If he made no inquiry but chose to rely on Dodson's statements, he is chargeable with knowledge of Dodson's authority, and his ignorance of its extent will be no excuse to him, and the fault cannot be thrown upon the corporation which never author-

ized the contract, although it was careless in reposing confidence in Dodson.

2 C. J., 564;
Bond v. Pontiac etc. R. Co., 62 Mich. 643;
Hurley v. Watson, 68 Mich. 531;
Gregory v. Loose, 19 Wash. 599.

As Dodson's authority was a limited authority to purchase the defendants' outfit for $250,000.00 with a guarantee of at least 9000 head of cattle, October calves not counted and thrown in, together with over a thousand acres of land, implements, equipment and improvements, he had no authority to bind the corporation to a purchase on any different terms.

In the case of

Starbird v. Curtiss, 43 Me. 352,

it was held that an agent authorized to purchase a one-sixteenth part of a ship at $40.00 a ton did not bind his principal by purchasing the same at $44.00 per ton.

Likewise in

Day v. Snyder, 130 S. W. 716,

it was held that where terms and conditions of the purchase are limited by the principal, the agent has no authority to purchase differently.

(E) The Contract Signed by Dodson Was Never Ratified or Approved by the Highland Cattle Company.

The evidence shows that, after he signed the contract in question, Dodson, on March 30th, 1913,

presented to the president and the secretary of the corporation a purported carbon copy of the contract in question, which copy contained a guarantee of 9000 head of cattle, October calves thrown in and not counted (Tr. p. 70), and on March 31st, 1913, the corporation received the advice or receipt (a photographic copy of which is found in the transcript, p. 74) which advice or receipt contained the statement: "There are to be 9000 cattle above October calves", and that thereupon the secretary of the corporation honored and paid the draft for $20,000.00.

Mr. Dangberg testified as follows (Tr. page 131):

> "At the time I paid the draft of $20,000 drawn by Dodson in favor of Day and Foster, it was paid out upon the advice which corresponded with his carbon copy of contract, and I believed the carbon contract was the contract upon which the money was paid."

It is in evidence that neither the president nor the secretary of the corporation saw the original contract until May 26th, 1913 (Tr. page 75).

The evidence clearly shows, without contradiction, that at the time the draft for $20,000.00 was paid by the secretary of the corporation, neither he nor the president had full knowledge of all the material facts to the transaction, particularly the material fact as to the number of cattle involved in the purchase.

Ratification of the act of an agent can only be had when the principal has full knowledge of all material facts.

2 C. J., 476 (and cases cited).

In the case of

McGlassen v. Tyrrell, 5 Ariz. 51,

it was held that to render the ratification of an agent's act effective, the principal must have been fully aware of every material circumstance of the transaction.

In

Brown v. Rouse, 104 Cal. 672,

where the defendant was a married woman whose husband, under an invalid power of attorney, mortgaged her property, and the defendant while residing in Oregon, through her California agent, paid installments of interest on the note and mortgage, believing that the note and mortgage bound her, it was held that such payment did not constitute ratification,

> "for the very essence either of election or ratification is that it is done advisedly with full knowledge of the party's rights".

In the case of

Dean v. Bassett, 57 Cal. 640,

it was held that the principal is not bound by an approval of an act already done, made under a misapprehension of the real nature of the facts.

To the same effect are the following:

Schutz v. Jordan, 141 U. S. 213;
Pease v. Fink, 3 Cal. App. 371;
Brown v. Wrightman, 5 Cal. App. 388.

In the last case, a traveling salesman agreed with a customer that the first order shipped, which was claimed to be defective, should be retained by the customer and that the price thereof be deducted from the price of the second order. The court held that the filling of the second order by the principal, without knowledge of the salesman's agreement, did not constitute ratification.

In

Clement v. Young McShea Amusement Co., 70 N. J. Eq. 677,

where the agent had authority to lease principal's property for one year and leased the same for three years, it was held that the acceptance of the rent, etc., did not constitute ratification, the fact of the three-year lease not being known to the principal.

In the case of

Valley Bank of Phoenix v. Brown, 9 Ariz. 311,

the bank, without authority, made a loan of Brown's money upon certain securities. The interest was paid to Brown. The bank's cashier suggested that Brown look over the securities. Brown did not examine same but returned them to the cashier, who assured her the securities were perfectly good.

After learning the facts as to the nature of the securities, Brown tendered the interest and repudiated the bank's act in the matter. The court held that a lack of knowledge as to the character or the valuation of the securities was a material circumstance and a ratification without it was not binding unless ignorance resulted from wilfulness and not mere carelessness.

IV.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE FINDING THAT THE HIGHLAND CATTLE COMPANY PAID THE $20,000.00 UNDER AND ACCORDING TO THE TERMS OF THE SIGNED CONTRACT, AND THAT THE SAID PAYMENT WAS NOT MADE BY REASON OF ANY MISTAKE ON THE PART OF THE COMPANY CONCERNING SAID CONTRACT OR ITS TERMS.

The evidence shows that the draft for $20,000.00 was honored and paid by the secretary of the corporation after Dodson had delivered to the president and the secretary a purported carbon copy of the contract signed, which copy contained a guarantee of 9000 head of cattle, October calves thrown in and not counted (Tr. page 70), and after receipt by said secretary of the advice or receipt containing the statement: "There are to be 9000 cattle above October calves"; and that when said payment was made said secretary believed the carbon copy to be a correct copy of the signed contract and believed said advice or receipt to be genuine (Tr. page 131).

There is no contradictory evidence in the record as to these facts, and we submit, that, in view of the fact that the corporation had no actual knowledge of the real terms of the signed contract and the fact that Dodson, in signing the contract in question, was not acting in pursuance or within the scope of his authority, it cannot be maintained, as a matter of law, that Dodson's knowledge must be imputed to the corporation.

> "The general rule that charges a principal with knowledge of facts known to his agent cannot be invoked, when the fact with which the principal is to be charged is the unauthorized act or agreement of the agent, whose knowledge thereof is sought to be imputed to the principal. To hold a principal chargeable with notice of the unauthorized agreement of the agent, and in this way raise the issue of estoppel by ratification on the part of the principal, would in effect destroy the rule which relieves the principal from liability for the unauthorized act or agreement of his agent."
>
> *Weathersby v. Texas, etc., Lumber Co.,* (Tex. Civ. A) 146 S. W. 243, 247.

V.

THE $20,000.00 HAVING BEEN PAID UNDER A CONTRACT MADE BY AN UNAUTHORIZED AGENT AND UNDER A MISTAKE OF FACT AS TO THE TERMS OF SAID CONTRACT, PLAINTIFF, AS ASSIGNOR OF THE CORPORATION, IS ENTITLED TO RECOVER THE SUM PAID.

The principle of law that money paid under mistake of a material fact without consideration

can be recovered back is so well established that we refrain from any lengthy discussion thereof.

To constitute a voluntary payment, so as to preclude recovery, it must be made with full knowledge of all material facts.

30 Cyc. 1300.

As we have heretofore endeavored to demonstrate, the evidence clearly shows that payment of the $20,000.00 was made by the corporation under mistake as to a most material term of the contract signed, namely, the number of cattle guaranteed in the proposed purchase.

In conclusion, we submit that Dodson had no express or implied authority, by virtue of his position as vice-president, director, resident agent or manager of the corporation, to enter into the contract in question, which contract, in view of the size of the corporation's business in New Mexico and the fact that Dodson had not theretofore made any purchase for the corporation of any cattle ranches or outfits, we submit, was unusual and extraordinary; that the only authority to Dodson was a limited authority to secure an option, or at most to purchase, on the terms which he reported to the president and the secretary of the corporation; that it was incumbent upon the defendants to apprise themselves of the extent of Dodson's authority, and that their failure so to do

was at their own peril; and that the payment of the $20,000.00, having been made without full knowledge of all material facts of the transaction, did not constitute ratification but was made under mistake as to the actual facts and circumstances of the transaction, namely, as to the number of cattle involved in the purchase; and that consequently, under the law, plaintiff, as assignor of the corporation, is entitled to recover the sum so paid under mistake.

We respectfully urge, therefore, that the judgment of the trial court be reversed and the cause remanded.

Respectfully submitted,

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